

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EBUDDY TECHNOLOGIES B.V.,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 20-1501 (MN) (CJB)
)	
LINKEDIN CORPORATION,)	
)	
Defendant.)	

**LINKEDIN CORPORATION'S LETTER REQUEST TO RENEW ITS
MOTION TO STAY**

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Attorneys for Defendant

September 10, 2021

Dear Judge Burke:

Pursuant to the Court's Order of April 26, 2021, Defendant LinkedIn Corporation ("LinkedIn") respectfully requests to renew its motion to stay filed on April 13, 2021 (D.I. 23-24) that sought to stay this action pending resolution of LinkedIn's motion to dismiss under 35 U.S.C. § 101 (D.I. 17-18), which is potentially case dispositive. The Court's Order invited LinkedIn to re-raise the issue of a stay with a one-page letter if the case progressed "closer past summer" and to the "invalidity contention stage" without a ruling on the Section 101 motion, which is the situation now. Ex. 1, Transcript Order of April 26, 2021, at 35:3-36:6.

In denying LinkedIn's original motion to stay, the Court found that the "status of the case" and "undue prejudice" factors favored a stay, but that the "simplification" factor did not, such that the Court was in "equipoise in terms of the strength of both sides' view." *Id.* at 27:12-23, 30:19-21, 34:21-23. As the circumstances are different now, the Court should enter a short stay until resolution of the Section 101 motion.

Specifically, with respect to undue prejudice, the Court estimated that it could resolve the pending 101 motion "sometime in summer, maybe even end of summer, maybe even early fall." *See id.* 28:14-23. As a result, the Court concluded that even if it ultimately decides the 101 motion in LinkedIn's favor, "it won't be as if a tremendous amount of work has been done and lost" in the period between April 2021 and the estimated decision date. *Id.* at 36:6-18. The undue prejudice factor therefore only "slightly" favored a stay. *Id.* at 30:13-18.

However, this calculus is now materially different, and this factor strongly favors a stay. If a short stay is entered now, Plaintiff will be subject to much less delay than in April 2021 under the Court's timeline for a 101 decision. On the other hand, now that Plaintiff recently served its infringement contentions on August 30 (D.I. 54), LinkedIn must prepare invalidity contentions for over 40 asserted claims across four patents-in-suit in about one month, by October 15 (D.I. 33). As the Court found, the "invalidity contention stage" is "a particularly time and resource intensive stage for defendant." Ex. 1, Tr. at 35:10-15. Because the Court expected to rule on LinkedIn's 101 motion before the costly invalidity contention stage, the Court instructed LinkedIn, if that were not the case, to "indicate its desire to re-raise the stay issue with the Court by simply filing just a short one-page letter indicating to the Court that that's its view and at that point if the [C]ourt thinks it's well taken, the Court can set a further briefing schedule." *Id.* at 35:15-36:6.

Accordingly, LinkedIn respectfully requests that the Court enter a short stay pending resolution of its dispositive 101 motion based on the original briefing and oral argument on this issue (D.I. 23, 24, 27, 29, Ex. 1) and this letter brief, to which LinkedIn proposes that Plaintiff be given three days to respond with a corresponding one-page letter. LinkedIn understands that Plaintiff still opposes a stay.

Respectfully,

/s/ Rodger D. Smith II

Rodger D. Smith II (#3778)

cc: All Counsel of Record (via electronic mail)

EXHIBIT 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EBUDDY TECHNOLOGIES B.V.,)
Plaintiff,) C.A. No. 20-1501-MN-CJB
v.)
LINKEDIN CORPORATION,)
Defendant.)

Monday, April 26, 2021
2:00 p.m.

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE CHRISTOPHER J. BURKE
United States District Court Judge

APPEARANCES:

FARNAN LLP
BY: JOSEPH FARNAN, ESQ.

-and-

EDMONDS & SCHLATHER PLLC
BY: STEPHEN F. SCHLATHER, ESQ.

Counsel for the Plaintiff

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THE COURT: Good afternoon,
everyone. It's Judge Burke here. Apologize for
being late again to the parties. I had two
teleconferences before yours and the last one
ended a bit longer, so apologize for keeping you
waiting. Let's go on the record and for the
record I'll say that we're here this afternoon
telephonically for a case management conference
and to address a motion to stay in a matter
captioned eBuddy Technologies B.V. versus
LinkedIn Corporation, civil action
20-1501-MN-CJB here in our court. Before we go
further, let's have counsel for each side who is
on the line identify themselves for the record.
We'll start with counsel for plaintiff's side
and we'll begin there with Delaware counsel.
MR. FARNAN: Good afternoon, Your
Honor. Joseph Farnan from Farnan LLP and with
me is Stephen Schlather from Edmonds & Schlather
in Houston, Texas. And with Your Honor's
permission, Mr. Schlather will be doing the
argument today.

THE COURT: Good afternoon to you
both. And we'll do the same for counsel on the

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1 APPEARANCES CONTINUED:

2 MORRIS, NICHOLS, ARSHT & TUNNELL, LLP
3 BY: RODGER DALLERY SMITH, ESQ.

4 -and-

5 PILLSBURY, WINTHROP, SHAW, PITTMAN, LLP
6 BY: CHRISTOPHER KAO, ESQ.
7 BY: BROCK S. WEBER, ESQ.
8 BY: ANTHONY F. VITTORIA, ESQ.

9 Counsel for the Defendant

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defendant's side and again we'll begin there
with Delaware Counsel.
MR. SMITH: Good afternoon, Your
Honor. It's Rodger Smith of Morris Nichols for
defendant LinkedIn. I'm joined this afternoon
by my co-counsel from Pillsbury Winthrop,
Christopher Kao and Brock Weber. And with Your
Honor's permission, Mr. Kao will be addressing
the Court.

THE COURT: All right. Thank you
and good afternoon to you all as well. Counsel,
just by way of background here, as the parties
know, the case is referred to me by the district
judge to resolve all matters up to and including
discovery related matters, so to the extent
those arise in the case, I'll be deciding them
in the first instance and that's why I'm here
with you at our case management conference as
well. I also note that the parties and I
appreciate, have met and conferred provided me
with a proposed schedule in the case and the
schedule itself doesn't have any disputes in it;
that is, the parties, as I understand it, agree
if the schedule is going to issue, there's no

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1 disputes as to the relevant dates and deadlines,
 2 but there is obviously a dispute about whether a
 3 schedule should enter in light of the motion to
 4 stay that's been filed in the case at DI number
 5 23 which we're going to talk about in just a
 6 second. To the extent I do order that a
 7 schedule should be entered, then what I will do
 8 is ask plaintiff's counsel on behalf of all
 9 sides to provide me with a revised proposed
 10 scheduling order that takes into account any
 11 additional information that we need to include
 12 besides what's been provided already by the
 13 parties and to resubmit on the docket by no
 14 later than close of business on Friday this
 15 week. And obviously that will depend on what is
 16 the result of the motion to stay, which we'll
 17 take up briefly. And the only other thing I
 18 would say, to the extent the Court does enter
 19 the schedule, the parties I know have asked for
 20 a 7-day trial in the case and we would be
 21 holding that number of days on Judge Noreika's
 22 calendar, but I always just remind parties
 23 that's certainly without prejudice to the
 24 district judge that as the case gets closer to

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1 trial to set an agreed upon amount of trial
 2 hours for each side to present their case and
 3 the judge obviously has the discretion to take a
 4 particular number of hours that might amount to
 5 less than or more than seven days once the judge
 6 is getting into the pretrial schedule. One
 7 other thing I would just note with regard to the
 8 proposed schedule is there's a section regarding
 9 alternative dispute resolution or ADR and I
 10 would say that I don't know whether or not I
 11 will be the magistrate judge who is assigned to
 12 this case to address ADR, but after a schedule
 13 is entered at whatever time that happens, the
 14 magistrate judge will be assigned on the docket
 15 and that judge, whether it's me or otherwise,
 16 will then likely issue an order that will give
 17 the parties guidance with regard to how they
 18 should address ADR with the Court. So just add
 19 those notes about a schedule again, whenever
 20 that schedule is entered in the case.

21 All right. As I noted up top,
 22 there is a dispute about whether I should enter
 23 a schedule at all in the case, which I'll hear
 24 briefly from the parties now on in light of the

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1 101 motion to dismiss that was filed by
 2 defendant's side. And so I'm happy to hear the
 3 sides' arguments with regard to that knowing
 4 that I have reviewed their letters that they
 5 submitted both in support of and in opposition
 6 to the motion to stay. So let me just give
 7 briefly each side the chance to just add
 8 anything they wish to add there. I'll turn
 9 first to plaintiff's side, Mr. Schlather, you're
 10 going to be speaking on behalf of the plaintiff?

11 MR. SCHLATHER: That's correct,
 12 Your Honor. Thank you.

13 THE COURT: So I guess let me just
 14 throw out a couple of quick questions for you
 15 and I'll certainly give you a chance to add
 16 anything else that you wish to add. On undue
 17 prejudice it looks like it's probably not
 18 disputed the parties aren't direct competitors,
 19 but the other side raised another issue which
 20 was they say you waited quite a while after you
 21 issued the respective patents to sue them. And
 22 I think in response you say something like well,
 23 that's -- that's speculative. And I guess
 24 speculative in terms of how long you waited to

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1 sue after you had a view that they might be
 2 infringing your patents. So I just wanted to
 3 ask, is there anything more you want to say
 4 about that, about how long you waited after you
 5 did know that they infringe your patents or why
 6 it is that the amount of time from the issuance
 7 of patents to when you sued shouldn't be a
 8 concern for me?

9 MR. SCHLATHER: Well, I would say
 10 that what LinkedIn has said is that eBuddy
 11 delayed eight years from the date that its
 12 patent issued until it filed the present lawsuit
 13 and then I guess that's a different issue than
 14 whether eBuddy waited after it learned of
 15 LinkedIn's infringement. Those are two wholly
 16 separate issues and I would say that any delay
 17 between when eBuddy learned of LinkedIn's
 18 infringement or when it formed a belief that
 19 LinkedIn was infringing its patent is
 20 substantially less than the eight years since
 21 the patents issued. EBuddy just simply did not
 22 have an opinion one way or the other at that
 23 point. I was not involved in the case,
 24 obviously, when these patents issued or well

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1 maybe it's not obvious, but I wasn't. Once we
 2 started our investigation, we proceeded with
 3 reasonable diligence to confirm our allegation
 4 of infringement and those are set forth in some
 5 significant detail in our complaint and
 6 proceeded to get this case on file. So, you
 7 know, with regard to LinkedIn's speculation,
 8 it's simply that. They made no allegations to
 9 when they started using the accused
 10 functionality in their systems and they made no
 11 allegations of when eBuddy became aware of that
 12 functionality and then how long there was --
 13 what delay, if any, there was after that.

14 THE COURT: Is there anything you
 15 wanted to say about that, along the lines of
 16 actually I think plaintiff became aware of this,
 17 I thought it was likely around here, this time
 18 and sure, we did wait for X number of months or
 19 years after that, but that was because of why?
 20 I know you said what they haven't alleged, but
 21 anything you want to say affirmatively in that
 22 regard?

23 MR. SCHLATHER: Well, from -- no.
 24 All I can say is once -- from I guess from my
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 1 perspective, when we became aware of our
 2 client's, I guess, knowledge that LinkedIn was
 3 using this contact aggregation and the bit
 4 notification functionality, we then proceeded to
 5 investigate those claims and, you know, filed
 6 the present lawsuit relatively or at least
 7 reasonably quickly thereafter and that was
 8 within the last year.

9 THE COURT: That all happened in
 10 2020 sometime, is that right?

11 MR. SCHLATHER: Yes, that's
 12 correct.

13 THE COURT: Okay. All right. And
 14 other things you wish to add about the stay
 15 related factors that either you didn't say in
 16 your letters or that that you wanted to kind of
 17 amplify?

18 MR. SCHLATHER: Yes, Your Honor.
 19 Thank you. So with regard to the simplification
 20 issue, there's just -- the case that LinkedIn
 21 primarily relies on, which is the Cabo case,
 22 this case is very different in at least two
 23 significant respects from that case. First,
 24 that case involved just a single patent and

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 1 secondly, that case did not include an expert
 2 declaration as this one does, supporting the
 3 factual allegations that eBuddy has made in its
 4 complaint. And so in that regard, I think the
 5 Court should look more closely at the Universal,
 6 the IBM and the Toshiba cases where, for
 7 instance, in IBM and Toshiba the court noted
 8 that there were multiple patents at issue with
 9 multiple claims. Here there's four patents with
 10 67 claims in total. And in those cases the
 11 Court reasoned that the likelihood that the
 12 motion to dismiss would resolve all those
 13 patents and all those claims was significantly
 14 lower and in those cases it didn't justify
 15 staying the case as a result. Also, LinkedIn's
 16 motion is substantially the same as its original
 17 motion and doesn't substantively or meaningfully
 18 address the factual allegations that eBuddy has
 19 made in its amended complaint, including the
 20 factual allegations that are supported by its
 21 expert's 77 page declaration.

22 With regard to the stage of the
 23 case, we cite in our response the Toshiba case
 24 and in that case the Court had not yet entered a
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 1 scheduling order either, but denied the motion
 2 to stay despite that. And so that I think the
 3 stage of the case and whether there is a
 4 scheduling order in place is not dispositive on
 5 that issue. And similarly in IBM, the Court
 6 held that the case should move forward even
 7 though it was still at a relatively early case.
 8 And notably that IBM case is one that's cited by
 9 LinkedIn and there the Court reasoned that where
 10 the amount of work that would need to be done in
 11 the interim between when the motion to stay was
 12 filed and when the underlying motion to dismiss
 13 was resolved would be relatively small and the
 14 same is true here, including if you look at the
 15 agreed schedule, the only thing that is likely
 16 to come up on the docket between now and when
 17 the motion to dismiss is decided are the
 18 parties' initial disclosures. And in IBM that's
 19 exactly what the Court ordered was that the
 20 parties should proceed forward with their
 21 initial disclosures while the motion to dismiss
 22 was resolved.

23 THE COURT: Likely for the other
 24 side the biggest amount of work at play in the
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1 early stage of the case is, you know, discovery
2 could get started and there could be efforts in
3 that regard, but invalidity contentions, which
4 it looks like here on the schedule are to be
5 produced on October of 15th this year, so
6 roughly about, you know, five and a half, six
7 months away, would probably be the biggest --
8 the biggest lift. Would you agree with that Mr.
9 Schlather?

10 MR. SCHLATHER: I think of the --
11 of the work that would reasonably be reached
12 before the motion to dismiss was decided,
13 invalidity contentions would likely be the
14 largest, the largest deadline on the defendant's
15 side. Although I will note that in the IBM
16 case, again, the case proceeded through
17 invalidity contentions and, you know, even
18 though the motion to stay was filed at an early
19 stage in that case as well.

20 THE COURT: Okay. Anything more
21 you wish to add before I hear from your
22 colleague on the other side?

23 MR. SCHLATHER: With regard to the
24 last factor, prejudice, LinkedIn is focused

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1 primarily on the fact that the parties are not
2 competitors, but that single issue is not
3 dispositive. Again, in the IBM case the parties
4 were not competitors and the Court allowed the
5 case to proceed. Similarly in the Toshiba case
6 there's no indication that the parties were
7 competitors and in that case the Court denied a
8 motion to stay. As we pointed out in our brief,
9 in the Cooper case, the courts in this district
10 have held that generally a showing of hardship
11 or inequity is needed to show that the balance
12 of factors favors a stay. And here LinkedIn has
13 shown no hardship or inequity or in any way that
14 it would be prejudiced by moving forward,
15 including at least moving forward through
16 initial disclosures as this court has done in
17 other cases.

18 With regard to conservation of
19 judicial resources, Your Honor can look at the
20 agreed schedule that the parties have submitted.
21 There's really nothing on that schedule that
22 would reasonably be reached before the Court
23 resolves the motion to dismiss and so there's
24 really no judicial resources that would be

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1 consumed. And to the extent that the parties
2 had to spend any time or resources, they would
3 be related to likely just limited to the initial
4 disclosures as we just discussed.

5 THE COURT: Okay. All right.

6 Thank you, Mr. Schlather. Let me turn to
7 counsel for defendant's side to hear their
8 response. And Mr. Kao, I'll turn to you.

9 MR. KAO: Thank you, Your Honor.

10 First, with respect to undue prejudice, I simply
11 don't think the plaintiff has made any case for
12 any prejudice that it would suffer in the event
13 of the stay. I think the plaintiff concedes
14 that any delay can be compensated by, you know,
15 monetary damages should it prevail ultimately.
16 So I don't think a brief stay of the case at all
17 effects the plaintiff here.

18 With respect to its reasonable
19 diligence, you know, although this wasn't
20 briefed, as I don't think we were aware that
21 this was going to be the response from the
22 plaintiff, but the mobile app at issue,
23 LinkedIn's mobile app has been around and
24 available since 2008. I don't -- because we

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1 have not, you know, entered discovery yet, I
2 don't know when the specific features at issue
3 may or may not have been added to the app, but
4 certainly there's been plenty of time for the
5 plaintiff to do diligence with respect to
6 potential infringement, so I do think there's a
7 significant delay in filing the suit. And
8 again, it's, you know, that just goes to the
9 point that there's no prejudice that the
10 plaintiff would suffer here by any stay.

11 In terms of the resources that
12 would be conserved by granting the stay here, I
13 do think not only are the invalidity
14 contentions, which Your Honor mentioned, a
15 significant undertaking for the defendant should
16 we have to do this while the motion to dismiss
17 is pending, in addition, we have to -- there is,
18 under the agreed schedule, the initial core
19 production of technical documents, which would
20 occur in July, along with, you know, initial
21 financial information. So that even initial
22 discovery would require a significant effort on
23 the defendant's part to locate and produce the
24 core technical documents, and, you know,

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1 relevant financial data.

2 THE COURT: Mr. Kao, anything you
3 want to say about what you think or understand,
4 you know -- I mean, what I know obviously it's a
5 matter of not only producing but also searching
6 for, but in some cases might be a fairly large
7 cache of information, in other cases they might
8 not be. Anything more you want to say about
9 what you think that's going to look like in this
10 case?

11 MR. KAO: So generally for
12 LinkedIn, it does require us to go through and,
13 you know, basically talk to the engineers who
14 have knowledge regarding the relevant features
15 and do a significant amount of searching through
16 their internal -- they call them wikis, but
17 there's essentially internal databases that
18 contain various features that are involved in
19 their software. So it is, I think, a not sort
20 of insignificant burden to do that, to conduct
21 all those interviews, search through their
22 internal documentation to get what we need. So
23 it's on the -- in some cases, you know, it's as
24 simple as just pulling a data sheet or that may

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1 even be publicly available. This isn't that
2 type of case, because these are internal
3 software features that there's not something,
4 you know, readily available that we could just
5 turn over.

6 THE COURT: Right. Okay. Let me
7 let you continue.

8 MR. KAO: Sure. I think the other
9 point I wanted to address is that, you know the
10 plaintiff is relying on the IBM case. That is a
11 case where the Court actually granted the motion
12 to stay pending a similar 101 motion to dismiss
13 and deferred entry of the scheduling order. So
14 it's similar to what we're asking for here. I
15 think some dates were set in that case, but for
16 the most part the Court deferred entry of the
17 schedule. And I think it is -- it is warranted
18 here because, yes, although there are four
19 patents which the plaintiff mentioned, they're
20 from the same family. They're sort of two sets
21 of patents from the same family, but the
22 specification is largely the same. And the
23 arguments that we have made, with respect to
24 section 101 and the patentability of the

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1 inventions claimed in these families are very
2 similar, so I think that this isn't a case where
3 you have multiple patents for multiple families
4 where there are different arguments being made.
5 Our motion to dismiss really is dispositive as
6 to all of these patents on the same theory,
7 based on, you know, patentability under section
8 101.

9 The last thing I will say is that
10 although the plaintiff relies on the fact that
11 it amended its complaint and attached an expert
12 declaration, a lengthy expert declaration to the
13 amended complaint, that is, as you will see, as
14 set forth in our motion to dismiss, the expert
15 witness cannot alter the substance of what is
16 actually set forth in the specification and the
17 claims of the asserted patents. And it is our
18 view as set forth in the motion to dismiss that
19 if the Court reviews the specification and the
20 asserted claims, that alone will demonstrate
21 that the patents are invalid under section 101.
22 And so all of this additional material from the
23 expert is at the end of day really irrelevant to
24 the motion.

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1 THE COURT: I guess two questions,
2 Mr. Kao. One is, and you alluded to it, in
3 addition to core technical documents, in the
4 earlier stage of the case, a heavy lift, usually
5 for defendants is the, you know, their last
6 initial disclosure, which is the invalidity
7 contentions. I understand you to be saying,
8 yes, in this case, no doubt like in many patent
9 cases, the work that is going to be required for
10 us at that stage is going to be significant too
11 and that's a part of the -- a decent chunk of
12 the work I'm talking about when I say that a lot
13 of effort will be at issue here for defendant's
14 side in the, you know, first, you know, six to
15 eight months of the case at issue, is that
16 right?

17 MR. KAO: That's correct, Your
18 Honor. The invalidity contentions are, as in
19 every patent case, a very significant
20 undertaking given the amount of work to identify
21 the prior art and to prepare the very detailed
22 claim charts that go into those.

23 THE COURT: The other thing I
24 would add, you know, certainly on my mind, so I

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1 want to give you a chance to give me your view
 2 of why it doesn't matter. A lot of the cases
 3 like IBM or Cabo to some degree, where in the
 4 past I had stayed the entry of the schedule in
 5 light of a 101 motion, you know, you know, post
 6 Alice, which has quite a lot of years since then
 7 and the reality is the landscape has changed
 8 with regard to 101, you know, five years ago in
 9 terms of, you know, what a 101 motion might have
 10 looked like, would result in if you just looked
 11 at kind of the data points from other matters,
 12 you know, if you didn't get into the specifics
 13 of the actual motion in the instant case, but
 14 you know, the number of those motions that were
 15 getting granted and were getting granted, you
 16 know, as to all claims, you know, whether in our
 17 court or otherwise, you know, pretty
 18 substantial. Since like a lot has happened,
 19 it's been a number of years, you've had
 20 Burkheimer, you just have the reality that, you
 21 know, on the ground, that and again like any
 22 particular case can be different, but in general
 23 on average I think anyone would be hard pressed
 24 to say the number of 101 motions getting granted

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1 as to -- certainly as to all patents or nearly
 2 all, is much less than it was, you know, two,
 3 four, five, six years ago, et cetera. So from a
 4 simplification perspective, isn't the reality we
 5 are looking at a somewhat different state of
 6 affairs just in terms of how likely it is that
 7 any one section 101 motion to dismiss is truly
 8 likely to be case dispositive at the pleading
 9 stage?

10 MR. KAO: Yes, Your Honor. I
 11 agree that the, I think the percentage, if you
 12 want to look at it that way, of 101 motions
 13 being granted at the 12(b)(6) stage has altered
 14 and is lower now than I think it was at the, you
 15 know, in the immediate aftermath of the Alice
 16 decision. That being said, I do think, however,
 17 this district has granted many 12(b)(6) motions
 18 based on section 101 at the pleading stage. I
 19 have been involved in a few in the last couple
 20 of years and I think if Your Honor looks at the
 21 track record, I think other judges in the
 22 district have granted such motions. So although
 23 I think from a ratio perspective it may be, you
 24 know, there may be less of a chance that the

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1 motion would be granted in its entirety, at the
 2 12(b)(6) stage, I think as I said, this court is
 3 still doing it, and doing it regularly. And for
 4 that reason, I do think a stay makes sense here.
 5 And obviously in particular we believe that this
 6 is one of those cases where the case should be
 7 dismissed at the 12(b)(6) stage, but you know,
 8 even if you look at percentages, I do think
 9 there's still a fair number of percentage of
 10 such motions being granted in this district and
 11 the Court should take that into account.

12 THE COURT: Okay. Mr. Kao,
 13 anything further you wanted to add with regard
 14 to issues that we haven't discussed?

15 MR. KAO: No, Your Honor.

16 THE COURT: Okay. And I guess
 17 I'll just briefly see if plaintiff's counsel has
 18 anything more they wish to say in rebuttal on
 19 this issue and I'll give Mr. Kao the same
 20 ability, but Mr. Schlather, anything further by
 21 way of rebuttal you wish to add?

22 MR. SCHLATHER: Yes, Your Honor.
 23 Thank you. Just quickly. With regard to the
 24 patents at issue, I'm not sure that I heard a

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1 clear kind of explanation of how those are
 2 comprised, so there are four patents. They fall
 3 into two separate patent families. Each patent
 4 family has a common specification, but it's --
 5 but all four patents do not share the same
 6 specification. That wasn't clear to me at least
 7 from Mr. Kao's statement, so I wanted to clarify
 8 that.

9 And then with regard to the IBM
 10 case, as Your Honor knows, the Court didn't
 11 enter a full schedule, but did allow the case to
 12 proceed through initial disclosures. And so at
 13 a minimum, the Court should consider the same
 14 structure, framework in this case to keep the
 15 case moving forward even if a full schedule is
 16 not entered.

17 THE COURT: Okay. And Mr. Kao,
 18 maybe you can remind me, you know, I have looked
 19 at the briefs with regard to the 101 motion,
 20 although certainly not in the detail that I'm
 21 going to, you know, when we get to the actual
 22 resolution of that motion, but my thinking was,
 23 you know, obviously four patents in suit here
 24 and they certainly bear relation, but my memory

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1 was, and maybe you can help add anything you
 2 wish to add on the record here, that in terms of
 3 kind of representation of claims, et cetera, it
 4 wasn't as clean as yes, we're talking about four
 5 patents, but it's all clear that there's kind of
 6 one representative claim amongst all four.
 7 There did seem to be at least some
 8 patent-specific back and forth between the
 9 parties in the briefing and I just wanted to
 10 know if you wanted to add anything more to how
 11 similar or distinct the 101 issues are going to
 12 be on a patent by patent basis.

13 MR. KAO: Sure. I think the way
 14 to look at it is the four patents are ultimately
 15 from the same family, but the plaintiff is
 16 correct, that they do break down into two
 17 groups. So the specifications are similar, but
 18 there are differences between the two groups of
 19 patents. So I think the way we have presented
 20 it in our motion, I think the way to look at it
 21 is really of the four patents they sort of break
 22 down into two and two, that are, you know, those
 23 two groups are slightly different, but there are
 24 representative claims with respect to I think

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1 each of the two groups.
 2 THE COURT: Right. If I'm
 3 remembering right, like with regard to the two
 4 groups, it was asserted by you and the plaintiff
 5 may dispute this, but that claim 7 of the '395
 6 was representative of two of the four patents
 7 and then claim 1 of the '135 was representative
 8 of the other two?

9 MR. KAO: Yes, I believe that is
 10 correct.

11 THE COURT: Okay. So maybe fair
 12 to say that yes, it's four patents, but Judge,
 13 our view is that doesn't mean you're going to
 14 have to go through four entirely separate and
 15 independent analysis for those patents with
 16 regard to 101. On the other hand, probably
 17 would acknowledge, but you probably will have to
 18 do some separate analysis with at least, if
 19 we're correct with regard to at least set number
 20 1 and set number 2, is that probably fair to
 21 say?

22 MR. KAO: That's correct, Your
 23 Honor.

24 THE COURT: And I'm not saying
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1 plaintiff agrees with this, they may dispute it,
 2 but okay, this is all helpful. I appreciate the
 3 parties' arguments. Let me go ahead and give
 4 you my decision here. Look, it's always a
 5 challenge to figure out how to deal with section
 6 101 motions which are, you know, maybe the rare
 7 motion in a patent case that gets filed at the
 8 pleading stage that could be potentially
 9 dispositive depending on how things go and
 10 obviously the court over time has taken some
 11 different approaches.

12 And so with regard to the facts on
 13 the record here, let me tell you how I'm going
 14 to decide the issue and the Court's order will
 15 be reflected in today's transcript of our case
 16 management conference. And that is, obviously
 17 with regard to the stay question, I look at the
 18 three stay related factors, which summarized are
 19 simplification, status of the case, and undue
 20 prejudice. I acknowledge that with regard to
 21 the last two of those, that is status of the
 22 case and undue prejudice, the defendant has the
 23 better of them. With regard to the stage of the
 24 case, it's clearly early in the case. Can't get

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1 much earlier. And obviously the later the case
 2 goes the more work and time and effort the Court
 3 and the parties put into litigating it, the less
 4 and less a stay tends to make sense for reasons
 5 I have described in lots of different opinions.
 6 Here we're at the very very outset, so certainly
 7 that factor favors a stay, favors defendant's
 8 motion.

9 With regard to the undue prejudice
 10 factor, I won't say it's all one side. I mean,
 11 defendants are right that the delay in and of
 12 itself is typically not seen as enough of a
 13 reason on its own for this factor to go the
 14 plaintiffs way. That said, it's not like the
 15 delay is irrelevant in the calculus either. And
 16 if this case were stayed until the Court
 17 resolved this 101 motion, would there be delay?
 18 Yeah, there would be. In my best guess, based
 19 on the amount of motions I have before me, and
 20 where this one falls, is that this 101 motion is
 21 likely not going to be decided until sometime in
 22 the summer, maybe even end of summer, maybe even
 23 early fall. And so if the case were stayed
 24 until I'm able to resolve it, it's going to take

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1 some time. And if it were to end up getting
 2 resolved in a way where the motion was denied in
 3 all or in part, the plaintiff's ability to move
 4 forward with the litigation is going to be
 5 compromised. There's going to be some decent
 6 delay. The case was filed back in November of
 7 2020 and, you know, it could well be, you know,
 8 close to a year after that date until the case
 9 gets fired up again. And of course that just
 10 means going through the process of setting a
 11 schedule, but by the time you get a scheduled
 12 entered, by the time you get started even with
 13 those initial stages, we'll be well beyond that
 14 before anything really meaningful happens in the
 15 case. So, you know, delay itself isn't enough
 16 of a reason for this third factor to go the
 17 plaintiff's way, but it's an issue here for
 18 sure.

19 Now, that said, I certainly take
 20 the defendant's point and it weighs in their
 21 favor that by all accounts we're not talking
 22 about a situation where the parties are direct
 23 competitors such that a stay could have outside
 24 consequences beyond the delay on the ability to

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1 seek monetary redress. And I don't know what to
 2 make of the amount of time between when the
 3 patents were issued here and when the case was
 4 filed. Plaintiff's counsel says that it wasn't
 5 clear to plaintiffs until very, very recently in
 6 2020 that the infringing technology was being
 7 utilized by LinkedIn. I don't know whether
 8 that's true or not. It does seem like there's
 9 been some delay for sure in terms of when the
 10 patents were issued versus when the case was
 11 filed. Hard to know how much of that delay
 12 should be held against the plaintiffs or not.
 13 At a minimum, though, because this is not a
 14 direct competitor situation, you know, the third
 15 factor would probably at least falls slightly in
 16 favor of the defendant's side, even though, as I
 17 noted, real delay here, could put on the
 18 plaintiff.

19 But on the other hand, is the
 20 simplification factor actually I think favors
 21 the plaintiff's case. I want to emphasize in
 22 saying that, I'm saying that without any, any
 23 prejudice to the actual merits of this actual
 24 motion filed by the defendant. It could well be

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1 that once the Court goes through that motion and
 2 the briefing, can ultimately determine in the
 3 end of the day the motion is well taken and all
 4 the patents should be found ineligible, but
 5 that's not what I'm doing here in a motion to
 6 stay. As I've said in prior opinions, I don't
 7 believe the stay calculus requires the Court or
 8 its even advisable for the Court to go through
 9 the motion and try to make some sort of
 10 prediction as to how it's going to rule on the
 11 actual argument. I think what is really asked
 12 of the Court by way of simplification factor is
 13 to take the data points that the Court is aware
 14 of writ large with regard to simplification
 15 separate and apart from the actual content of
 16 the pending motion that is alleged to be the
 17 simplifier and to try to figure out, on balance,
 18 does the suggestion that if the case were stayed
 19 this will simplify things makes sense? I
 20 actually don't think it does in light of all
 21 that I know. Obviously, again, if I end up
 22 deciding that the motion is well taken as to all
 23 four patents, then yeah, it would be
 24 tremendously simplified, this case would go away

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1 unless of course the district court disagrees
 2 with me.
 3 As I noted in cases like Cabo, I
 4 have to consider all the outcomes here that
 5 could result in light of a stay. And there's
 6 obviously the outcome that the motion could be
 7 rejected in its entirety. There's also the
 8 outcome, because we're dealing with four patents
 9 with at least some different arguments as to 101
 10 here, that some patents may survive even if
 11 others didn't. And so for that reason alone, I
 12 think, you know, the idea that, you know, four
 13 patents case, all four patents are likely to be
 14 found ineligible may be a little bit of an
 15 uphill climb for the defendant. I say that's
 16 even more the case, though, in light of the
 17 Court's experience. I don't really think the
 18 district's experience writ large and probably
 19 the nation's experience in terms of judiciary
 20 101 motions at the pleading stage over the last
 21 year or two as compared to the early stages post
 22 Alice. I don't think you could deny that in
 23 recent years, particularly post Burkheimer, the
 24 reality is that fewer motions to dismiss are

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1 being granted in their entirety, especially in
 2 cases involving multiple patents just as a
 3 statistical matter. I know in my own cases for
 4 sure. Although it is possible for me to rule
 5 that a motion to dismiss on 101 grounds is well
 6 taken at the pleading stage. I did it recently
 7 in a case. The reality is that the last 10 such
 8 101 motions at the pleading stage, the large,
 9 large majority of those ultimately resulted in a
 10 decision not to find the patents ineligible at
 11 least at that stage. Often it's because there's
 12 a potential fact issue and the decision is that
 13 the motion should be or could be re-filed at the
 14 summary judgment stage. Indeed Judge Noreika,
 15 who is the district judge in this case, recently
 16 in a case called Commvault in which there was a
 17 large number of patents at issue and asserted
 18 claims at issue and yet a motion to dismiss was
 19 filed on 101 ground as to all have those patents
 20 and claims, pretty summarily rejected the motion
 21 in essence saying the resources at issue were
 22 better spent at the summary judgment stage. I'm
 23 not saying that'll be my opinion here, I'm
 24 saying the reality is we're in a much different

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1 place than we were years ago in terms of likely
 2 outcomes of motion to dismiss on 101 grounds at
 3 the pleading stage and at a different stage I
 4 was at when I decided those issues, for example,
 5 in the IBM case. Just on average with the facts
 6 of record, the most likely average outcome here
 7 is that the motion is not likely to be entirely
 8 successful. Again, I emphasize has nothing to
 9 do with the actual merits of this motion. I'm
 10 just saying in general. If that is the likely
 11 outcome just based on the statistics and the
 12 Court's experience, then, you know, again, how
 13 much would the case be simplified to have a case
 14 that's been stayed for quite a long time where
 15 discovery hasn't even gotten fired up, all with
 16 regard to a case that's ultimately going to need
 17 to move forward probably, even if ultimately at
 18 summary judgment the patents are found to be
 19 ineligible, so I think the simplification factor
 20 here actually favors the plaintiff's side.

21 When I tie all this together, I
 22 think really I'm kind of in equipoise in terms
 23 of the strength of both sides' views. And so
 24 because I'm not convinced at this stage in light

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1 of where we are that the motion -- that the
 2 defendant's position is stronger than the
 3 plaintiff's, I'm going to deny the motion and
 4 I'm going to enter a scheduled in the case. I
 5 will say, that another reason that I'm doing
 6 that is because I do think it's likely, that
 7 even though as I said it will take some months
 8 to resolve this motion just in terms of where it
 9 falls on the list and all the motions ahead of
 10 it, I do think it's likely that I will be able
 11 to resolve it before we get to or too close to
 12 the invalidity contention stage. I know from
 13 experience that that is the stage that is a
 14 particularly time and resource intensive stage
 15 for defendant. But if it happens that as we get
 16 closer and closer past summer and into fall and
 17 I still haven't resolved the 101 motion, I hope
 18 that's not the case and expect it won't be, and
 19 we're getting closer to that and the defendant
 20 believes that it now, in light of the work
 21 that's been done and all that it faces with
 22 regard to completing invalidity contentions,
 23 thinks that it can make a stronger case with
 24 regard to the stay factor, it can certainly

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1 indicate its desire to re-raise the stay issue
 2 with the Court by simply filing just a short
 3 one-page letter indicating to the Court that
 4 that's its view and at that point if the court
 5 thinks it's well taken, the Court can set a
 6 further briefing schedule. In the interval, I'm
 7 not saying no work will occur. I know core
 8 technical document production is some work the
 9 defendants will have to do. I know that the
 10 discovery process will get ramped up, discovery
 11 requests will be made, parties will start to
 12 look into what it means to respond to those, but
 13 my view that in the few months between now and
 14 as we get into the summer, so much will not have
 15 happened that even if I ultimately end up
 16 deciding the defendant's motion in its favor, it
 17 won't be as if a tremendous amount of work has
 18 been done and lost.

19 And so for all those reasons I'm
 20 going to deny the motion to stay and enter a
 21 schedule in the case at this stage. Having said
 22 that, the parties, as I noted, provided me with
 23 a proposed schedule. There's just a couple of
 24 dates that I need to fill in with dates from

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1 myself or Judge Noreika's calendar and I do have
 2 those here. And so let me just let the parties
 3 know of them and then as I said, I'll ask
 4 plaintiff's counsel on behalf of all sides to
 5 submit a revised proposed scheduling order by no
 6 later than close of business on Friday of this
 7 week that includes these dates as well. And
 8 they are first, with regard to the Markman
 9 hearing in the case, we'll schedule that hearing
 10 before me on March 16th of 2022. That's March
 11 16th of 2022 at 11 o'clock a.m. eastern. March
 12 16th, 2022 at 11 a.m. And the pretrial
 13 conference will be on June 5th, 2023. That's
 14 June 5th, 2023, at 4:30 p.m. before Judge
 15 Noreika. And the trial will be set to begin on
 16 June 12th, 2023 in Judge Noreika's courtroom.
 17 And so we'll just ask plaintiff's counsel to
 18 include those dates in the revised proposed
 19 scheduling order. And when I see that order,
 20 I'll sign and enter it and the case will be on
 21 its way.

22 With that said, I do also, in the
 23 case management conferences, let the parties let
 24 me know if there's any other issue, not one that

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1 relates to the entry of a schedule or scheduling
 2 order disputes, but some other issue about the
 3 case where they say, Judge, I just want to give
 4 you a heads up that this issue might come up or
 5 it's something a little unusual, just want to
 6 make the Court aware of it. Happy to give you
 7 the chance to let me know that. Not that do
 8 have to have such an issue, but if you do, I'm
 9 happy to hear it. So let me just turn to
 10 plaintiff's counsel. Is there anything
 11 plaintiff's counsel wishes to add with regard to
 12 that issue?

13 MR. SCHLATHER: No, Your Honor.
 14 Thank you.

15 THE COURT: Okay. I'll give the
 16 same chance to defendant's counsel.

17 MR. KAO: No, Your Honor.

18 THE COURT: All right. As I said,
 19 I know there's a motion to dismiss pending and
 20 I'll get to it as soon as I can. With all that
 21 said, I wish everybody a good day and good week
 22 and obviously continued health and safety and
 23 the Court will end our teleconference today and
 24 we'll go off the record. Thank you, everybody.

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1 Bye bye.

2 (End at 3 p.m.)

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1 State of Delaware)
)
 2 New Castle County)

3
 4
 5 CERTIFICATE OF REPORTER
 6

7 I, Stacy M. Ingram, Certified Court Reporter
 8 and Notary Public, do hereby certify that the
 9 foregoing record, Pages 1 to 40 inclusive, is a true
 10 and accurate transcript of my stenographic notes
 11 taken on April 26, 2021, in the above-captioned
 12 matter.

13
 14 IN WITNESS WHEREOF, I have hereunto set my
 15 hand and seal this 26th day of April 2021, at
 16 Wilmington.

17
 18
 19 /s/ Stacy M. Ingram
 20 Stacy M. Ingram, CCR

21
 22
 23
 24
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